No. 12,074

IN THE

United States Court of Appeals

For the Ninth Circuit

RICE GROWERS ASSOCIATION OF CALIFORNIA (a corporation), *Appellant,*
vs.
REDERIAKTIEBOLAGET FRODE (a corporation), Owner of the Steamship "Frej", *Appellee.*

APPELLANT'S PETITION FOR A REHEARING.

GEORGE H. HAUERKEN,
HAUERKEN & ST. CLAIR,
535 Russ Building, San Francisco 4, California,
Proctors for Appellant and Petitioner.

Table of Authorities Cited

Cases

Codes

No. 12,074

IN THE

United States Court of Appeals

For the Ninth Circuit

RICE GROWERS ASSOCIATION OF CALIFORNIA (a corporation),
Appellant,

vs.

REDERIAKTIEBOLAGET FRODE (a corporation), Owner of the Steamship "Frej",
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William Denman, Presiding Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellant Rice Growers Association of California, hereinafter referred to as Rice Growers, respectfully petitions for a rehearing of the above entitled cause, following the decision of this Honorable Court rendered on June 24, 1949. The rehearing is sought only as to the question of the value of the S.S. "Frej" for limitation purposes and not as to the question of freight.

The opinion can be summarized as follows:

(1) The limitation of liability statute must be liberally construed in favor of the shipowner.

(2) When so construed, the statute gives the shipowner the right to terminate his voyage at any time after claims exceed the value of his vessel.

(3) Although the right to terminate his voyage is given him by the statute, the shipowner need not, when so terminating it, comply with any of the requirements of the statute.

In support of the first proposition, the opinion cites *Just v. Chambers,* 312 U.S. 383, 85 L.Ed. 903, and *Coryell v. Phipps,* 317 U.S. 406, 87 L.Ed. 363. In support of the second and third propositions, the opinion cites nothing.

To construe the limitation statute liberally in favor of the shipowner does not mean that every issue arising between him and cargo must be decided in his favor. It must first be determined whether the issue calls for a construction of the statute. The issue raised in this case (the termination of the voyage) does not call for any construction of the statute, for the simple reason that the statute does not purport to come into effect until it has *otherwise* been determined that the voyage is at an end. It has repeatedly been held that the rights which the statute gives to the shipowner arise only at the termination of his voyage. The statute assumes that, under the general maritime law, the voyage was at an end; it does not concern itself with how it ended, whether by arrival at destination or by destruction of the vessel short of destination.

Nor does it purport to give to the shipowner a right to terminate his voyage which is denied him by the general maritime law. (See, *The Maggie Hammond v. Morland,* 9 Wall. 435, 19 L.Ed. 772; *Assicurazioni Generali v. SS. Bessie Morris Co.,* VII Aspinall's Reports (N.S.) 217.)

In both *Just v. Chambers,* supra, and *Coryell v. Phipps,* supra, the issues as to which the Supreme Court of the United States stated that the statute should be liberally construed arose in the course of the limitation proceeding, *after* the shipowner had complied with all the requirements which open the door to the proceeding. There was apparently no question as to when and where the voyage terminated in those cases. Moreover, both Chambers and Phipps had apparently posted the security necessary to enable them to insist upon a liberal construction of the limitation statute. The issue in this case, however, arises before the gate of the statute is opened and there is no authority anywhere for the proposition that an issue of that kind should be liberally determined in favor of the shipowner. On the contrary, the Supreme Court of the United States has held that the preliminary issue of compliance with the requirements of the statute must be strictly determined against the shipowner. In *The Main v. Williams,* 152 U.S. 122, 38 L. Ed. 381, in determining what the shipowner had to surrender as freight, the Court stated at page 385 of 38 L. Ed.:

> "The English courts have held, very properly we think, that these statutes should be strictly con-

strued. As observed by Abbott, *Ch. J.*, in *Gale v. Laurie,* 5 Barn. & C. 156, 164: 'Their effect, however, is to take away or abridge the right of recovering damages, enjoyed by the subjects of this country at the common law, and there is nothing to require a construction more favorable to the ship owner than the plain meaning of the word imports.' To the same effect are the remarks of Sir Robert Phillimore in *The Andalusian,* 3 Prob. Div. 182, 190, and in *The Northumbia,* L. R. 3 Adm. 6, 13. Speaking of this statute, *Lord Justice* Brett in *Chapman v. Royal Netherlands Steam Nav. Co.,* L. R. 4 Prob. Div. 157, 184, remarked: 'A statute for the purposes of public policy, derogating to the extent of injustice, from the legal rights of individual parties, should be so construed as to do the least possible injustice. This statute, whenever applied, must derogate from the direct right of the ship owner against the other ship owner. * * * It should be so construed as to derogate as little as is possible consistently with its phraseology, from the otherwise legal rights of the parties.'

"While, from the universal habit of insuring vessels, the application of the statute probably results but rarely in an actual injustice to the owner of the injured vessel, yet, being in derogation of the common law, we think the court should not limit the right of the injured party to a recovery beyond what is necessary to effectuate the purposes of Congress." (Italics added.)

No case has ever held before, as this Honorable Court now holds, that the statute gives the shipowner a right to terminate the voyage which he otherwise

would not have. The opinion restates the established rule that valuation must be had as of the end of the voyage, and then proceeds to destroy that rule with the announcement that the voyage may of course be terminated and valuation accordingly be had at any time the shipowner pleases. It is submitted that the test announced by all the cases and by Rule 51 of the Admiralty Rules of the Supreme Court (which, incidentally, was revised by the Supreme Court *after* its decision in *Just v. Chambers,* supra, and *after* its decision in *Coryell v. Phipps,* supra), is an objective and not a subjective test.

Rule 51 now requires the petition for limitation of liability to set forth:

> "The voyage on which the demands sought to be limited arose, with the date and place of its termination; * * *
>
> The value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings or proceeds, if any, * * *"

Rule 51 further provides that the *ad interim* stipulation shall be for:

> "The value of petitioner's interest in the vessel at the close of the voyage or, in the case of wreck, the value of the wreckage, strippings or proceeds, * * *".

It is, therefore, clear that Rule 51 supports the position which has been that of Rice Growers throughout this case, namely, that limitation can be had only as of the time when the vessel actually arrived at

destination, or as of the time when a wreck in fact terminated her voyage. The Supreme Court would not, throughout Rule 51, insist upon "the voyage", if all it meant was that the shipowner may pick out the date as of which valuation must be had.

If the shipowner can, for limitation of liability purposes, terminate his voyage at any time he pleases, there is no reason to require him to surrender the value of his interest in the vessel "at the close of the voyage"; all that is necessary is to allow him to surrender it "at any time he pleases". Moreover, if he can thus shorten the voyage, for limitation of liability purposes, there is no reason why he should not be allowed to expand it for the same purpose so as to include in one limitation proceeding all the claims which arose during any given six months' period.

Both in its briefs and at the oral argument Rice Growers took the position that, since a limitation of liability proceeding is equitable in nature, Frode should be required to do equity before coming into Court and asking for a liberal construction of the statute. Rice Growers accordingly contended that this case could not be decided without a determination of whether or not the abandonment of the voyage on June 19 was wrongful. Frode gave no answer to that contention either in its briefs or at the oral argument and now this Court gives no answer thereto. It is true that the contention is noted in the opinion and that it is therein seemingly conceded that equitable principles control. How they control, however, is unfortunately not made clear. Nor is it made clear how

they can control in a decision in which the question of whether the party seeking equity must first do equity is expressly left open.

This Court now holds (for the first time) that a shipowner may terminate a voyage whenever claims against him exceed the value of the vessel, irrespective of whether the vessel arrived at destination or was wrecked. This Court further holds (for the first time) that that right is given him by the limitation statute. If that right does stem from the statute, however, the time when the statute is invoked is the only possible time (always bearing in mind that there was neither wreck nor actual completion of the voyage) when the voyage can be terminated.

Section 185 of 46 U. S. Code provides as follows:

> "The vessel owner, * * * may petition a district court of the United States * * * for limitation of liability * * * and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. *Upon compliance with the requirements of this section all claims and proceedings against the*

> *owner with respect to the matter in question shall cease.*" (Italics added.)

Rule 51 of the Admiralty Rules of the Supreme Court provides in part as follows:

> "The owner or owners of any vessel who shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the Act of March 3, 1851, entitled 'An Act to limit the liability of shipowners and for other purposes' (Sections 183 to 189 of Title 46 of the U. S. Code, 46 U.S.C.A. §§ 183-189) as now or hereafter amended or supplemented, *may file a petition in the proper District Court of the United States, as hereinafter specified.*" (Italics added.)

If Section 185 and the quoted part of Rule 51 mean anything, they mean that, in order to be entitled to the benefits of the limitation statute, the shipowner *must first* file his petition and otherwise comply with the requirements of the statute.

It has repeatedly been held that the statute must be strictly complied with, even though it be liberally construed, before the shipowner can claim the benefits provided thereunder. In *The Chickie* (C.C.A. 3, 1944) 141 Fed. (2d) 80, for example, the Court referred at p. 85 to "the well settled rule that the Courts are to construe the statute liberally" and nevertheless held that

> "the proceeding on the petition was never sufficiently completed for the jurisdiction of the court to attach to this extent. All that the owners did was to file their petition. There was no trans-

fer of a res to a trustee; no monition ever issued; the required fee for filing the petition was not even paid. The petition had no legally operative effect; we may dismiss it from further consideration." (141 F. (2d) at 84.)

Similarly, in *Petition of Goulandris* (C.C.A. 2, 1944), 140 F. (2d) 780, certiorari denied 322 U.S. 755, 88 L. Ed. 1584, the Court dismissed a petition for limitation of liability filed within the 6 months' period and accompanied by a stipulation for costs on the ground that the petitioning shipowner had failed to comply with the requirement of the statute by either surrendering his vessel or posting adequate security.

In *In re Jacobson,* 52 F. (2d) 179, the Court stated at p. 180:

"Limiting as it does the common-law doctrine of responsibility for the acts of servants and agents, *this statute makes a very valuable concession, neither to be frittered away by undue restrictions upon it nor to be incontinently allowed except upon full compliance with the conditions of the grant.* Cases like The Annie Faxon (C.C.A.), 75 F. 312; People's Navigation Co. v. Toxey (C.C.A.), 269 F. 793; Kitsap County v. Harvey (C.C.A.), 15 F. (2d) 166, 48 A.L.R. 1420, in their emphasis upon the difference between the personal and the imputed fault of the owner have tended to overemphasize the exemption from liability; other cases stressing the necessity for compliance with the conditions fixed as the basis for the enjoyment of the exemption have clarified, or at least brought into balance, some of the expressions in

> those cases. Cases of this kind are Great Lakes Towing Co. v. Mill Transportation Co. (C.C.A.), 155 F. 11, 20, 22 L.R.A. (N.S.) 769; Benner Line v. Pendleton (C.C.A.), 217 F. 497, 500; The Etna Maru (D.C.), 20 F. (2d) 143; Christopher v. Grueby (C.C.A.), 40 F. (2d) 8." (Italics added.)

In *Standard Wholesale P. & A. Works v. Travelers Ins. Co.* (C.C.A. 4, 1939), 107 Fed. (2d) 373, the Court stated at p. 376:

> "The right of the owner of a vessel to limit liability is wholly statutory in the United States. The Main v. Williams, 152 U.S. 122, 14 S.Ct. 486, 38 L.Ed. 381, and authorities there cited. *To avail himself of this right granted by the statute the owner must bring himself within the terms fixed by the statute. While the purpose of the statute is to protect and encourage maritime commerce and, while statutes of this character are to be liberally construed, this liberality of construction cannot be extended so that express conditions laid down by the statute itself are waived or ignored.*" (Italics added.)

It should finally be noted that Congress itself has recently indicated that the new liberal attitude adopted by the Supreme Court in those cases in which the shipowner has fully complied with the statute shall not be applied in those cases in which the preliminary issue is raised of whether the shipowner did fully comply with the statute. In 1936, Congress amended Section 185 to require the shipowner to file his petition for limitation of liability within six (6) months after the filing of claims. It has repeatedly

been held that that amendment was intended *to cut down and not to enlarge the rights of the shipowner.* (See *Petition of Goulandris,* supra; *Standard Wholesale P. & A. Works v. Travelers Ins. Co.,* supra.)

It is therefore clear that, if the shipowner can claim no rights under the statute, even though he filed his petition, unless he also complies with all the other requirements of the statute, he cannot claim any rights thereunder at the time when he has not even filed his petition and when, for all that appears, he does not even contemplate filing a petition. *When on June 19, Frode purported to terminate the voyage, it not only had not filed any petition for limitation of liability, but it had not even indicated in any way that it intended ever to do so.* Under the circumstances, it cannot possibly be held that the right to unilaterally terminate the voyage, which, under the opinion of this Honorable Court is a new right given to the shipowner by the statute, can be invoked before the statute itself has been invoked.

The situation is analogous to that presented under the Bankruptcy Act. Let us assume that, on June 19, Frode was in effect insolvent and would have been entitled to claim the benefit of the Bankruptcy Act as of that date, upon surrender of its assets (the "Frej") to a trustee in bankruptcy. Let us further assume that instead of *filing a petition* in bankruptcy on June 19, Frode elected to wait until July 26 and to file it on that date. It is of course clear that Frode would have to surrender its assets (the "Frej") in the condition in which they were on July 26 and not in the

condition in which they were on June 19. Failure to surrender its assets as of July 26, would result in a denial by the Court of the rights to which Frode would otherwise be entitled under the Bankruptcy Act.

It is submitted that the situation is exactly the same under the limitation of liability statute and that, *just as there is only one way to claim the benefits of the Bankruptcy Act, there is only one way to claim the benefits of the limitation of liability statute: by filing a petition, surrendering the vessel or posting security and otherwise fully complying with the requirements of the statute.* Until that has been done, none of the rights which are given the shipowner by the statute can possibly accrue.

For the foregoing reasons, a rehearing should be granted.

Dated, San Francisco, California,
July 20, 1949.

Respectfully submitted,
George H. Hauerken,
Hauerken & St. Clair,
Proctors for Appellant and Petitioner.

Certificate of Counsel.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
July 20, 1949.

George H. Hauerken,
Of Counsel for Appellant and Petitioner.